

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ JUL 11 2013 ★

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE

\_\_\_\_\_  
X  
IMOGENE COLE and GEORGIA BROWN,  
individually and on behalf of all  
others similarly situated,  
Plaintiffs,

**MEMORANDUM AND ORDER**  
11-CV-3779 (SLT) (SMG)

- against -

STEVEN J. BAUM and STEVEN J. BAUM, P.C.,  
Defendants.

\_\_\_\_\_  
X  
**TOWNES**, U.S. District Judge

Plaintiffs, Imogene Cole and Georgia Brown ("Plaintiffs"), bring this putative class action against Steven J. Baum, P.C. and its principal Steven J. Baum (together "Defendants"), pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., alleging that Defendants used false, deceptive, or misleading representation, or unfair or unconscionable means, to collect a debt by failing to file a specialized Request for Judicial Intervention ("RJI") at the same time they filed proof of service of the summonses and complaints in foreclosure actions involving Plaintiffs. Plaintiffs also allege that this failure violated New York General Business Law ("NYGBL") § 349.

Defendants now move to dismiss Plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons discussed infra,

Defendants' motion is granted.

I. Background

As noted above, Plaintiffs' pleadings principally allege that Defendants violated the FDCPA and a state statute, NYGBL § 349, by failing to comply with procedural requirements set forth in section 3408 of New York Civil Practice Law and Rules ("CPLR") and certain rules established by the Chief Administrator of the Courts for implementing section 3408, to wit 22 NYCRR § 202.12-a ("Section 202.12-a"). Plaintiffs' pleadings describe these procedural requirements at length and some familiarity with these two provisions is necessary to understand the gist of Plaintiffs' claims. Accordingly, before discussing the factual allegations relating to Plaintiffs, the Court will describe these state-law provisions in some detail.

**CPLR 3408 and Section 202.12-a**

In the wake of the mortgage foreclosure crisis, the New York State Legislature passed the Subprime Residential Loan and Foreclosure Laws. See L. 2008, c. 472. These laws were codified in various statutes, including CPLR 3408, and became effective on August 5, 2008. See L. 2008, c. 472, § 3; Wells Fargo Bank, N.A. v. Meyers, 966 N.Y.S.2d 108, 109-10 (N.Y. App. Div. 2013). In pertinent part, CPLR 3408 provides for mandatory settlement

conferences in certain residential foreclosure actions.

Specifically, CPLR 3408(a) states:

In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

The procedures and rules for CPLR 3408 settlement conferences are set forth in Section 202.12-a, a rule promulgated by the Chief Administrator of the Courts. Notably, this rule provides:

At the time that proof of service of the summons and complaint is filed with the county clerk, plaintiff shall file with the county clerk a specialized request for judicial intervention (RJI), on a form prescribed by the Chief Administrator of the Courts, applicable to residential mortgage foreclosure actions covered by this section. The RJI shall contain the name, address, telephone number and e-mail address, if available, of the defendant in the action and shall request that a settlement conference be scheduled.

22 NYCRR 202.12-a(b)(1).

The New York State Legislature has not prescribed any particular sanction or penalty to impose upon a party found to have failed to satisfy its obligations under CPLR 3408. See

Wells Fargo Bank, 966 N.Y.S.2d at 118. Accordingly, the New York State Courts have resorted to a variety of alternatives in an effort to enforce the statutory mandates of CPLR 3408. See Id. at 116. The Supreme Court of the State of New York, Appellate Division, Second Department ("Second Department"), has held some of these judicially created remedies to be impermissible. For example, in IndyMac Bank F.S.B. v. Yano-Horoski, 912 N.Y.S.2d 239, 240 (N.Y. App. Div. 2010), the Second Department held that the "severe sanction imposed by the [New York State] Supreme Court of cancelling the mortgage and note was not authorized by any statute or rule." Similarly, in Wells Fargo Bank, the Second Department concluded that the order which compelled Wells Fargo to "execute a final modification patterned after the terms of the trial loan modification proposal and directing dismissal of the complaint" "was unauthorized and violated the Contract Clause and Wells Fargo's due process rights." Id. at 118. However, neither the Second Department nor any other New York State appellate court has endorsed any particular sanction.

#### **The Facts Alleged in this Case**

The Amended Complaint ("Am. Compl.") in this case, the allegations of which are assumed to be true for purposes of this motion to dismiss, principally alleges a violation of Section 202.12-a. That pleading alleges that as of November 2011--the

time the Amended Complaint was filed--Plaintiffs both owned real property in Queens, New York, which had been mortgaged to secure loans made to them by financial institutions. (Am. Compl. ¶¶ 86-87, 101.) Plaintiffs fell behind on their mortgage payments, prompting the financial institutions to commence foreclosure proceedings. (Id. ¶¶ 90-91, 103-04.) In both cases, those proceedings were prosecuted by defendant Steven J. Baum, P.C. ("the P.C."), one of the largest foreclosure law firms in New York State. (Id. ¶¶ 30, 83, 91, 104.) Defendant Steven J. Baum ("Baum") is the controlling shareholder of the P.C., and is "involved in individual case-level decision-making" at the law firm. (Id. ¶ 28.)

In both cases, the P.C. filed with the court proof of service of the summons and complaint. (Id. ¶¶ 92, 104.) However, in neither case did the P.C. file a specialized RJJ form contemporaneous with their filings of the proof of service of the summons and complaint. (Id. ¶¶ 92-93, 105-06.)

On or about August 3, 2011, Plaintiffs commenced this action. According to Plaintiffs' Amended Complaint, Defendants' failure to file the specialized RJJ forms as required by Section 202.12-a prevented Plaintiffs from resolving their mortgage loan delinquencies through the New York State statutorily mandated settlement conference process pursuant to CPLR 3408. (Id. ¶¶ 50-52, 117-18.) Plaintiffs allege that Defendants' unlawful conduct

caused them to incur increased loan penalties and resulted in the accrual of unnecessary fees and expenses against the loan accounts. (Id. ¶¶ 124-25, 129-30.)

The Amended Complaint asserts three causes of action. In the first two causes of action, Plaintiffs allege that Defendants' omissions constituted violations of the FDCPA. The first cause of action alleges a violation of 15 U.S.C. § 1692e, which prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." (Id. ¶¶ 123-25.) The second cause of action alleges a violation of 15 U.S.C. § 1692f, which prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." (Id. ¶¶ 128-30.) Plaintiffs' third cause of action asserts a New York State law claim pursuant to NYGBL § 349. This statute prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." (Id. ¶ 134, quoting NYGBL § 349(a).)

In lieu of answering the complaint, Defendants now move to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(6). Defendants raise three points in their Memorandum of Law in support of their motion ("Defs.' Memo. of Law"). Point I, which alleges that Plaintiffs' claims fail to state a cause of action, contains five subsections. In the first two subsections, Defendants contend that Plaintiffs have failed to articulate a plausible claim

pursuant to Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), arguing that a violation of a court rule does not give rise to a claim for relief. (Defs.' Memo. of Law at 9-12.) In their third subsection, they assert that Plaintiffs' FDCPA allegations should be rejected because technical failures of state rules of procedure do not amount to "false, deceptive, or misleading representation" or "unfair or unconscionable means" in collecting a debt. (Id. at 12-15.) In the fourth subsection, Defendants allege that Plaintiffs' claims are barred by the Noerr-Pennington doctrine. (Id. at 15-17.) In the fifth subsection, Defendants contend that Plaintiffs' claim pursuant to NYGBL § 349 should be dismissed as the complaint fails to allege that Defendants engaged in consumer-oriented fraud, that any conduct was deceptive or misleading in a material way, or that Defendants caused any damages to Plaintiffs. (Id. at 17-21.)

In Point II, Defendants note that "[c]omity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss" a federal action in favor of state-court litigation. (Id. at 21 (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282 (2005)).) In particular, Defendants assert that the Court should abstain from hearing the claims alleged in the complaint on two bases. First, Defendants urge abstention pursuant to R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941), arguing that there are

ambiguities surrounding the controlling state rules. (Id. at 21-22.) Second, Defendants seek abstention pursuant to Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976), noting that there are parallel, ongoing state foreclosure actions pending against Plaintiffs. (Id. at 22-23.)

In Point III, Defendants contend that if the Court exercises jurisdiction over Plaintiffs' claims, then the claims should be dismissed against Baum individually. Defendants contend that the evidence relied upon by Plaintiffs fails to set forth a basis for imposing individual liability. (Id. at 23-25.)

## II. Legal Standard

In considering a motion to dismiss pursuant to Rule 12(b)(6), a court must accept all factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). A court's role at this stage is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Ashcroft v.



Iqbal, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; see County of Erie, N.Y. v. Colgan Air, Inc., No. 12-1600-cv, 2013 WL 780991, at \*1 (2d Cir. Mar. 4, 2013). If plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. at 570.

### III. Discussion

Since the only federal causes of action alleged by Plaintiffs are brought pursuant to the FDCPA, the Court will first address Defendants' argument that the Amended Complaint fails to state a claim under that statute. The FDCPA is a consumer protection statute concerning debt collection activity and seeks to establish a "set of requirements that would constitute minimum national standards for debt collection practices" while leaving intact state laws which may provide higher levels of protection. Romea v. Heiberger & Assocs., 163 F.3d 111, 118 (2d Cir. 1998); see Richardson v. Allianceone Receivables Mgmt., Inc., No. 03 Civ. 5519(DLC), 2004 WL 867732, at \*2 (S.D.N.Y. Apr. 23, 2004). In enacting the FDCPA, Congress sought to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively

disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” Hess v. Cohen & Slamowitz LLP, 637 F.3d 117, 120 (2d Cir. 2011) (internal citation and quotations omitted). Further, the statute serves “to protect consumers from deceptive or harassing actions taken by debt collectors with the purpose of limiting the suffering and anguish often inflicted by independent debt collectors.”

Gabriele v. American Home Mortg. Servicing, Inc., No. 12-985-cv, 2012 WL 5908601, at \*3 (2d Cir. Nov. 27, 2012) (internal citations, quotations, and bracket omitted); see Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85, 91 (2d Cir. 1998) (the FDCPA’s “overarching purpose” is to “deter[] deceptive conduct”).

“Congress painted with a broad brush” in determining what actions are covered under the FDCPA. Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27 (2d Cir. 1989). In seeking recovery under the statute, a consumer need not necessarily show “intentional conduct on the part of the debt collector.” Ellis v. Solomon and Solomon, P.C., 591 F.3d 130, 135 (2d Cir. 2010); see 15 U.S.C. § 1692k; Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 63 (2d Cir. 1993) (“The FDCPA is a strict liability statute”). Moreover, as the FDCPA is a remedial statute, it must be construed liberally in favor of the consumer. See Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1175-76 (9<sup>th</sup> Cir. 2006); Johnson v. Riddle, 305 F.3d 1107, 1117 (10<sup>th</sup> Cir.

2002). "The FDCPA establishes a civil cause of action against any debt collector who fails to comply with any provision of [the statute]," Foti v. NCO Financial Sys., Inc., 424 F. Supp. 2d 643, 653 (S.D.N.Y. 2006) (internal quotations and citation omitted), enabling aggrieved parties to recover damages, attorney's fees, and costs. See 15 U.S.C. § 1692k(a); Hecht v. United Collection Bureau, Inc., 691 F.3d 218 (2d Cir. 2012).

Here, Plaintiffs allege violations of two specific provisions of the FDCPA: 15 U.S.C. 1692e and 1692f. Both of the sections contain several subsections that provide a non-exhaustive list of specific ways in which the statute may be violated. However, Plaintiffs do not invoke any particular subsection under either Section 1692e or 1692f.

"Generally, a plaintiff must satisfy three threshold requirements in order to recover under the FDCPA: (1) The plaintiff must be a 'consumer;' (2) the defendant must be a 'debt collector;' and (3) the defendant must have committed some act or omission in violation of the FDCPA.'" Friedman v. Sharinn & Lipshie, P.C., No. 12 CV 3452(FB)(CLP), 2013 WL 1873302, at \*3-4 (E.D.N.Y. Mar. 28, 2013) (bracket omitted) (quoting Oscar v. Prof'l Claims Bureau, Inc., No. CV11-5319 (SJF)(WDW), 2012 WL 2367128, at \*3 (E.D.N.Y. Jun. 1, 2012)); see also Boosahda v. Providence Dane LLC, 462 Fed. Appx. 331, 333 n. 3 (4<sup>th</sup> Cir. 2012). In this case, Plaintiffs' Amended Complaint explicitly

alleges that Plaintiffs are consumers as that term is defined pursuant to the FDCPA. (Am. Compl. ¶¶ 26, 27.) See 15 U.S.C. § 1692a(3) (defining consumer as “any natural person obligated or allegedly obligated to pay any debt”). Plaintiffs’ pleading also alleges that Defendants are debt collectors as that term is defined by 15 U.S.C. 1692a(6). (Am. Compl. ¶¶ 28, 29.) Although there is a split of authority as to whether the enforcer of a security interest is a “debt collector” under the general definition of Section 1692a(6) and thereby subject to the entirety of the FDCPA, or rather, whether an enforcer of a security interest should be considered a “debt collector” for the purposes of Section 1692f(6) only, see Derisme v. Hunt Leibert Jacobson P.C., 880 F. Supp. 2d 311, 323 (D. Conn. 2012); Chomilo v. Shapiro, Nordmeyer & Zielke, LLP, Civ. No. 06-3103 (RHK/AJB), 2007 WL 2695795, at \*3 (D. Minn. 2007) (both acknowledging that a split of authority exists), Defendants do not contest, for purposes of this motion, that they are “debt collectors” for purposes of the FDCPA.<sup>1</sup>

---

<sup>1</sup> The Eleventh Circuit has recently addressed this issue and reasoned that since “the statute specifically says that a person in the business of enforcing security interests is a ‘debt collector’ for the purposes of § 1692f(6) ... [it] reasonably suggests that such a person is not a debt collector for purposes of the other sections of the [FDCPA].” Warren v. Countrywide Home Loans, Inc., 342 F.App’x 458, 460 (11th Cir. 2009); see Montgomery v. Huntington Bank, 346 F.3d 693, 700–01 (6th Cir. 2003) (same). On the other hand, the Fifth Circuit has concluded that “a party who satisfies § 1692a(6)’s general definition of a ‘debt collector’ is a debt collector for the purposes of the entire FDCPA even when enforcing security interests.” Kaltenbach v. Richards, 464 F.3d 524, 529 (5th Cir. 2006); see Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 378 (4th Cir. 2006) (same). The Second Circuit has not yet addressed this question.

Rather, Defendants' motion largely focuses on the third element--whether it committed some act or omission in violation of the FDCPA. In Point I, subsection C of their Memorandum of Law, Defendants argue that violations of state procedural rules do not give rise to claims for relief and that, even if they did, a violation of the New York State procedural rule at issue would not give rise to a claim under the FDCPA. (Defs.' Memo. of Law at 12-13.) In response, Plaintiffs argue that "a debt collector's failure to adhere to state or local law in collecting [a] debt violates the FDCPA." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion ("Plaintiffs' Opposition"). In support of that proposition, Plaintiffs cite to various cases in which, according to Plaintiffs, "[f]ederal courts have held that violations of state law by attorneys in debt collection lawsuits violate §§ 1692e and 1692f of the FDCPA." (Id. at 10.)

The cases cited by Plaintiffs, however, involve instances in which the state law violation was either itself alleged to violate the FDCPA or to form an integral part of an FDCPA violation. For example, in the first case cited by Plaintiffs--Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009)--two of the defendants violated a Florida law which prohibits non-lawyers from "drafting, preparing, or filing pleadings on behalf of another." Id. at 1363 (citing Fla. Bar v. We the People Forms & Serv. Ctr. of Sarasota, Inc., 883 So.2d 1280 (Fla. 2004)).

Although neither of the defendants was a lawyer, they filed a lawsuit in state court seeking eviction and money damages on behalf of a client landlord and attorney's fees for their services. The plaintiff in Sanz alleged that these actions violated both Florida law and specific provisions of the FDCPA, including 15 U.S.C. § 1692e(2)(B), which prohibits making false representation of the compensation which may be lawfully received by any collector of a debt; 15 U.S.C. § 1692e(5), which prohibits making a threat to take an action that cannot legally be taken; and 15 U.S.C. § 1692f(1), which prohibits attempting to collect an amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law. The Sanz Court denied the defendants' motion to dismiss these claims, stating: "Because Plaintiff alleges that the Defendants are nonlawyers who filed the Eviction Complaint seeking attorney's fees ..., and that this action violates [various provisions of the FDCPA] ..., Plaintiff has adequately alleged that 'the defendant has engaged in an act or omission prohibited by the FDCPA.'" Id. at 1363 (quoting Pescatrice v. Orovitz, P.A., 539 F. Supp. 2d 1375, 1378 (S.D. Fla. 2008) (internal quotation omitted)).

Similarly, in Kirk v. Gobel, 622 F. Supp. 2d 1039 (E.D. Wa. 2009) - the second case cited by Plaintiffs - the defendant was alleged to have violated the FDCPA by seeking to recover

attorney's fees to which the defendant was not entitled under state law. The defendant's request for attorney's fees was based, in part, on section 4.84.250 of the Revised Code of Washington--a provision which permits the "prevailing party" in certain actions to recover attorney's fees. However, in order to be deemed a "prevailing party" for purposes of this statute, the party's recovery, exclusive of costs, had to exceed "the amount offered in settlement by the plaintiff, or party seeking relief ..." Wash. Rev. Code § 4.84.270. At the time the defendant sought attorney's fees in a motion for default judgment, the defendant "was aware that no settlement offer had been made," but nonetheless claimed "4.84.250 as an alternative basis for attorneys fees." Id. at 1046. The Kirk Court found that this attempt to collect attorney's fees under an inapplicable theory was "unfair and misleading under 15 U.S.C. §§ 1692e and 1692f ..." Id. at 1046.

In the fourth case cited by Plaintiffs--Lamb v. Javitch, Block & Rathibone, L.L.P., No. 1:04-CV-250, 2005 WL 4137786 (S.D. Oh. Jan. 24, 2005)--the alleged state law violations were alleged to have resulted in unfair and deceptive debt collection practices. In that case, the defendant, a law firm, moved in Ohio state court to confirm an arbitration award that it had obtained against plaintiff. The defendant did not request a hearing on the motion, although there was some authority for the

proposition that a hearing was statutorily required and although the defendant admitted requesting oral hearings in most of the other arbitration confirmation actions that they had filed. Moreover, while Ohio law clearly provided that such applications were to be brought as a motion, the defendant commenced the action in a bizarre and confusing manner. On these facts, which at least suggested a concerted--and successful--effort to prevent the plaintiff from opposing the arbitration confirmation motion, the district court concluded that the plaintiff had adequately alleged unfair and deceptive debt collection practices.

However, "[n]ot every violation of state or city law amounts to a violation of the FDCPA." Nero v. Law Office of Sam Streeter, P.L.L.C., 655 F. Supp. 2d 200, 209 (E.D.N.Y. 2009); see Okyere v. Palisades Collection, LLC, No. 12 Civ. 1453(GWG), 2013 WL 1173992, at \*8 (S.D.N.Y. Mar. 22, 2013) ("the failure to comply with a state law is not an automatic violation of the FDCPA"). For example, courts in this Circuit have held that technical failures to comply with local licensing statutes do not violate the FDCPA. In McDowell v. Vengroff, Williams, & Assocs., Inc., No. 04-CV-1068 (CBA), 2006 WL 1720435, at \*3 (E.D.N.Y. Jun. 21, 2006), the court concluded that the failure to provide a license number on a collection notice as was required by local law was not sufficient by itself to state a claim under the FDCPA. The court reached the same result in Richardson v.



Allianceone Receivables Mgt., Inc., 03-CV-5519 (DLC), 2004 WL 867732, at \*3 (S.D.N.Y. Apr. 23, 2004) ("While [defendant's] failure to list its License Number may violate a New York City ordinance, there is no basis to conclude that this minor deficiency renders the Letter false, deceptive, or misleading within the meaning of the FDCPA."). Similarly, in Lindbergh v. Transworld Sys., Inc., 846 F. Supp. 175, 181 (D.Conn. 1994), the court granted summary judgment in favor of the debt collector, finding that there was no claim under the FDCPA when the out-of-state office of an in-state, licensed, legitimate debt collector sent correspondence to an in-state debtor. The court reasoned that holding otherwise would "reflect[] a false, narrow, and overly mechanical reading of the FDCPA." Id.

Even debt collection practices in violation of state law are not per se violations of the FDCPA. See Wade v. Regional Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996). For example, in Wade, the plaintiff alleged that the defendant, a California collection agency, engaged in collection activity in Idaho without obtaining the permit required by Idaho state law. While acknowledging that the defendant may have violated state law, the Wade Court identified the relevant issue as "not whether [the defendant] violated the state statute, but whether it violated the [FDCPA]." Id. The Court expressly rejected the plaintiff's contention that the defendant's unlicensed collection actions violated the FDCPA

because the defendant "deprived the plaintiff of her right as a consumer debtor residing within the state to have the defendant's qualifications as a collection agency reviewed by state authorities." Id. (quoting Gaetano, 774 F.Supp. at 1415, n.8). The Court stated, "[i]f Wade was deprived of such a right, her remedy lies in Idaho state law, not in Section 1692f of the FDCPA." Id. at 1100-01.

In this case, as in Wade, the defendants' debt collection practices did not violate the provisions of the FDCPA. Defendants allegedly violated 22 NYCRR § 202.12-a, a procedural rule promulgated by the Chief Administrator of the New York Courts to facilitate implementation of CPLR 3408. However, CPLR 3408 is not a state analog of the FDCPA. That statute does not prohibit unfair, misleading or deceptive collection practices, but merely furthers a state interest in forestalling or preventing foreclosures. Although defendants may be debt collectors, and their alleged violation of Section 202.12-a may be characterized as unfair, defendants' violation of this state procedural provision neither resulted in, nor contributed to, the sort of unfair debt collection practices prohibited by the FDCPA. Accordingly, this Court finds that Plaintiffs' Amended Complaint fails to state a cause of action under the FDCPA.

### **Comity and Abstention**

Since this Court concludes that Plaintiffs' Amended Complaint fails to state a claim under the FDCPA, there is no need to address Defendants' remaining arguments under Point I. There is also no need to address Point II of Defendants' Memorandum of Law, which raises considerations of comity and various abstention doctrines. Nonetheless, this Court will address Defendants' comity and abstentions arguments briefly.

Preliminarily, this Court doubts that abstention would be appropriate in this case under either R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941), or Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976). First, while "Pullman abstention may be appropriate where a claim implicates an unresolved or unclear issue of state law," Handberry v. Thompson, 436 F.3d 52, 73 (2d Cir. 2006), this Court is not convinced that the relevant provisions of 22 NYCRR § 202.12-a are so unclear as to warrant abstention. Second, Defendants' brief does not adequately establish the sort of "extraordinary circumstances" that would justify abstention under the six-factor test established in Colorado River. See Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84 (2d Cir. 2012).

On the other hand, this Court agrees with Defendants that principles of federalism and comity militate against construing

the FDCPA so broadly as to encompass violations of 22 NYCRR § 202.12-a and/or CPLR § 3408. "The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction," Levin v. Commerce Energy, Inc., 560 U.S. 413, \_\_\_, 130 S.Ct. 2323, 2330 (2010), so as to accord "proper respect for state functions." Id. (quoting Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 112 (1981)). The Supreme Court has repeatedly cautioned that "[s]tatutes conferring federal jurisdiction ... should be read with sensitivity to 'federal-state relations' and 'wise judicial administration.'" Levin, 130 S.Ct. at 2331 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996)). Similarly, the Second Circuit has recognized that "'principles of federalism and comity' instruct us to leave unresolved questions of state law to the states 'where those questions concern the state's interest in the administration of its government.'" Southern New England Tel. Co. v. Comcast Phone of Conn., Inc., \_\_ F.3d \_\_, 2013 WL 1810837, at \*6 (2d Cir. May 1, 2013) (quoting Valencia v. Lee, 316 F.3d 299, 306 (2d Cir. 2003)).

If this Court were to hold that violations of 22 NYCRR § 202.12-a and/or N.Y. CPLR § 3408 are actionable under FDCPA, this Court would be unnecessarily involving itself in procedural questions arising in an on-going State court case. Moreover, this Court would effectively be filling a void in state law by

establishing a remedy for the violation of these state-law provisions. As the Second Department noted in its recent decision in Wells Fargo (discussed at pp. 3-4, ante), neither the Legislature nor the Chief Administrator of the Courts has provided "specific guidance ... as to the appropriate sanctions or remedies to be employed where a party is found to have violated its obligation to negotiate in good faith pursuant to CPLR 3408(f)." Wells Fargo, 966 N.Y.S.2d at 116. Accordingly, the state's trial courts have "resorted to a variety of alternatives in an effort to enforce the statutory mandate to negotiate in good faith," including barring the non-compliant party from collecting interest, legal fees, and expenses; imposing exemplary damages against them; staying the foreclosure proceedings and dismissing the foreclosure action.

While the Second Department held that the sanction imposed by the trial court in Wells Fargo--namely, the imposition of the terms of an unexecuted agreement proposed by the plaintiff and accepted by the defendants--was "unauthorized and inappropriate," Id. at 116, that Court declined to endorse any specific sanction or remedy. Rather, the Second Department stated:

In the absence of a specifically authorized sanction or remedy in the statutory scheme, the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case. What may prove appropriate recourse in one case may be inappropriate or unauthorized under the circumstances presented in another. Accordingly, in the absence of further guidance from the Legislature or the Chief Administrator of the Courts, the

courts must prudently and carefully select among available and authorized remedies, tailoring their application to the circumstances of the case.

Id. at 118. This standard affords considerable discretion to the trial court, which might be usurped if the option of monetary damages under the FDCPA were available.

#### **Plaintiff's Claims under New York General Business Law § 349**

Plaintiffs' Amended Complaint alleges only one cause of action aside from the causes of action pursuant the FDCPA. The third cause of action advances a state-law claim, alleging that Defendants engaged in a "deceptive act or practice" in violation of NYGBL § 349. (Am. Compl. ¶¶ 132-42.) Title 28 U.S.C. § 1367(c)(3) "permits a district court in its discretion, to decline to exercise supplemental jurisdiction over state law claims if it has dismissed all federal claims." Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 103 (2d Cir. 1998). "The exercise of supplemental jurisdiction is within the sound discretion of the district court." Lundy v. Catholic Health Sys. of Long Island Inc., 711 F.3d 106, 117 (2d Cir. 2013). In exercising that discretion, "[t]he court must 'consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction' over the pendent claim." Raucci v. Town of Rotterdam, 902 F.2d 1050, 1055 (2d Cir. 1990)

(quoting Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988)). “[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims.” Cohill, 484 U.S. at 350 n.7.

Considering the facts of this case, this Court declines, in the exercise of its discretion, to exercise supplemental jurisdiction in this case. All federal claims have been dismissed and no trial has yet been scheduled. Accordingly, this cause of action is dismissed without prejudice to pursuing the NYGBL § 349 claim in state court.

IV. Conclusion

For the reasons stated above, Defendants' motion to dismiss Plaintiffs' amended complaint is granted. The Clerk of Court is directed to enter judgment in accordance with this Memorandum and Order and to close this case.

**SO ORDERED.**

/s/(SLT)

/SANDRA L. TOWNES  
United States District Judge

Dated: July **10**, 2013  
Brooklyn, New York